

CRIMINAL LAW UPDATE

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NEBRASKA APPELLATE COURTS

CONFESSIONS

Night-Night Time: No Interrogation of Sleepy Suspect

State v. Hayes, No. A-00-515 (Neb. Ct. App. November 14, 2000)

Factual Background

On October 10, 1998, a child was brought into a hospital emergency room in Lincoln, NE, with severe injuries to the head. At 4 a.m., Lincoln Police Officer Chris Ehrhorn contacted Defendant Hayes in the ER and requested that Hayes accompany him to the station for an interview. Hayes agreed. Pursuant to a pat-down of Hayes, Ehrhorn removed and kept in his possession cigarettes and a lighter. Ehrhorn transported Hayes to the station in the back seat of his cruiser.

At the station, Hayes was asked to wait in a 10x12 foot interview room. Ehrhorn maintained possession of the cigarettes and lighter.

At 4:45 a.m., Lincoln Police Investigator Timothy Carmichael began the interview with Hayes. At 5:30 a.m., the following interaction occurred:

HAYES: [Y]ou guys just couldn't let me go home and get sleep could you?

INV. CARMICHAEL: No, because we need to get this handled right now.

....

OFFC. EHRHORN: I don't want you to think about going home and getting some sleep. I want you to think about [the vic-

tim]. . . . I couldn't let you go home and go to bed.

Prior to initially being contacted by Officer Ehrhorn, Hayes had been awake for 17 hours straight and had slept for only 4 of the previous 36 hours. The interviewing officers were aware of these facts.



This initial interview continued until 9:42 a.m.

During that period, Hayes was given two short breaks for the purposes of using the restroom, getting a drink of water, and having a smoke outside in an alley. Hayes was accompanied by an officer at all times during said breaks.

From 9:42 until 11:40 a.m., Hayes was allowed to remain in a large area containing cubicles where the detectives' and investigators' desks are located. At 11:40 a.m., the interview continued in the interview room, at which point Inv. Carmichael read Hayes his *Miranda* rights. Carmichael admitted at trial that Hayes was not free to leave at this point.

The interview that began at 11:40 a.m. lasted until 1:17 p.m., and was videotaped. During said interview, Hayes repeatedly stated that he was tired; that his thoughts were muddled; that his mind was getting numb to the point where he could not remember; that he could not remember things because he was tired; that he was so tired he could not think; that all he wanted to do was sleep; that he felt like he was "drained;" that there was "nothing left;" that he was "empty" and "hollow;" and that he wanted to "just jump off a . . . 10 story building" because the officers would not leave him alone.

After the interview concluded at 1:17 p.m., Hayes remained in the interview room until 5:08 p.m., at which time Inv. Carmichael entered the interview room and found Hayes asleep on the floor curled up in a fetal position. Carmichael asked Hayes if he would be willing to take a polygraph test, and Hayes consented. However, Hayes indicated that he did not think he would pass.

Sometime between 5:08 and 6 p.m., Hayes was escorted to an officers' lounge, where he was allowed to sleep on a full-length couch. At 7:45 p.m., Carmichael awakened Hayes for the purpose of taking the polygraph test. Both before and after the test, Hayes was offered the opportunity to use the restroom, get a drink, and get something to eat, but Hayes declined. Altogether, preliminary matters, the polygraph test itself, and a post-test interview for the purpose of clearing up some issues that arose during the test lasted until 11 p.m.

At trial in Lancaster County District Court, Hayes made a motion to suppress all of his statements made to officers on October 10, 1998. The district court granted this motion. In so doing, the court first found that the statements made by Hayes prior to being read his *Miranda* rights were inadmissible because the pre-*Miranda* interviews constituted custodial interrogation. As to Hayes' post-*Miranda* statements, the district court held that they were involuntary, and therefore inadmissible. The State appealed the district court's decision to the Nebraska State Court of Appeals pursuant to Neb. Rev. Stat. § 29-116 (Cum. Supp. 1998). A single judge on the court of appeals affirmed.

Court of Appeals Analysis

Before discussing the opinion of the *Hayes* decision, it is important to note that the court of appeals reviewed the district court's decision for clear error. This means that the district court's decision to suppress must be "clearly erroneous," not just erroneous, be-

fore it can be overturned. This is a strict standard that is difficult to overcome on appeal.

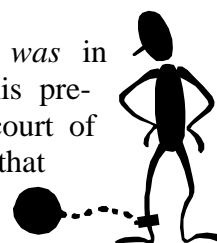
A. Pre-*Miranda* Statements

The *Hayes* court first noted that *Miranda* warnings are required whenever a person is subjected to "custodial interrogation," which is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action."

Hayes was clearly subject to interrogation. As to whether he was in custody, the *Hayes* court noted that "[t]he determination . . . is made by reference to the circumstances of the interrogation and an analysis of *whether a reasonable person would have felt that he or she was at liberty to terminate the interrogation.*"

In holding that Hayes was in custody when he made his pre-*Miranda* statements, the court of appeals found significant that "Hayes was taken to the police station by a uniformed officer who patted him down prior to placing him in a marked cruiser and [that] he was escorted everywhere in the police station, including the restroom." The court also found significant the interaction between

Pre-*Miranda* statements will not be admissible if a reasonable person in the suspect's position would not feel free to terminate the interview.



Hayes, Carmichael, and Ehrhorn that took place at 5:30 a.m., as noted above. Based on these factors, the court reasoned that it was *not* clear error for the district court to find that a reasonable person in Hayes' position would not have felt free to terminate the interrogation.

B. Post-*Miranda* Statements

To begin with, the *Hayes* court noted several legal rules regarding post-*Miranda* statements. First, "Statements made by a defendant after *Miranda* rights are given

must still be made voluntarily.” Second, “The voluntariness of a statement is to be tested by looking at all the circumstances” And third, under this totality of the circumstances test, “The Nebraska Supreme Court has stated that the use of physical punishment such as the deprivation of food or sleep is a factor to be taken into account when considering whether a defendant’s statement was voluntary.”

In reaching its conclusion that the district court was not clearly erroneous in finding that Hayes’ post-*Miranda* statements were involuntary, the *Hayes* court said the following:

“In the instant case, although tiredness or fatigue does not automatically equate to being forced to make a statement to law enforcement officers or to being in such a state that one no longer has a free choice, at the time that Investigator Carmichael’s interview with Hayes began, Hayes had been up for 17 hours straight and had slept fewer than 4 hours in the preceding 36 hours. On multiple occasions during the interview, Hayes requested that he be granted an opportunity to sleep, and these requests were denied.

Moreover, a review of the videotape of Hayes’ statements [from his 11:40 a.m. interview] shows that at times during the interview, Hayes was finding it difficult to sit and look at Investigator Carmichael, and that he told Investigator Carmichael so. He told Investigator Carmichael more than once that fatigue was interfering with his ability to think and remember. At one point, Investigator Carmichael asked, ‘You, you don’t have any energy left at all to look at me and talk to



Extreme fatigue or sleepiness may render a post-*Miranda* statement involuntary and, therefore, inadmissible.

me?’ to which Hayes responded, ‘I’m just tired, all I wanna do is just sleep, that’s all I wanna do. I just wanna sleep.’ Despite Hayes’ obvious fatigue and the effect that Hayes said that the fatigue was having on him, Investigator Carmichael merely noted that he was tired too, continued the questioning, and asked Hayes to do the best he could.”

Based on the above, the court of appeals held, “[U]nder the totality of the circumstances . . . I cannot say that the district court’s determination that Hayes’ statements were involuntary was clearly wrong.”

In conclusion, the *Hayes* court stated the following:

“I agree with the district court’s assessment that although the officers had nothing to do with the fact that Hayes arrived at the police station having slept only 4 of the preceding 36 hours, they had everything to do with denying his repeated requests to sleep and continuing the questioning when they knew of his lack of sleep and [when] Hayes told them on numerous occasions that he was becoming confused, that his thoughts were becoming muddled, and that he was having difficulty remembering. Further, the police had everything to do with keeping Hayes at the police station from 4 a.m. to 11:30 p.m. while failing to provide him with an adequate opportunity to sleep, even though there were lengthy breaks in Hayes’ questioning.”

The court then reiterated its holding that the district court’s holding as to involuntariness was not clearly erroneous.

Overnight House Guests: Do They Have a Leg to Stand On?

State v. Lara, 258 Neb. 996, 607 N.W.2d 487 (2000)

Background on the Exclusionary Rule

The exclusionary rule provides that evidence obtained in violation of the defendant's constitutional rights may generally not be introduced by the prosecution at the defendant's criminal trial. As to when the exclusionary rule may be invoked with regard to a search and seizure, the United States Supreme Court has said that the rights assured by the Fourth Amendment are personal rights that may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. Under this limitation, a defendant may challenge the constitutionality of a search or seizure only when the defendant had a legitimate privacy interest in the things seized or premises searched. See *Rakas v. Illinois*, 439 U.S. 128 (1978).

Factual Background in *Lara*

On August 2nd 1998, Jack Lara was an overnight house guest at a home in Grand Island, Nebraska. A party with a guest list ranging from 20-100 people was in progress at the residence, and to no one's surprise a fight broke out. During the course of the fight, the victim, Mark Logan, was shot three times. The shooter was described as a Hispanic male, weighing 150 pounds, and wearing a striped shirt. The description



What do you think? Should an overnight guest in someone's home be afforded the same rights as the owner or residence of that home? And what areas of the residence should they have a reasonable expectation of privacy in?

matched the defendant, Jack Lara. The police then questioned Lara after he was given the Miranda warnings had and signed a waiver. During this questioning, Lara admitted to shooting Logan and indicated to the officers that the gun he used in the shooting was located in the northwest basement bedroom of the residence.

Upon determining from the owner of the home that Lara was an overnight guest, they received permission from her, but did not get a search warrant to search the premises. The officers found the gun where Lara indicated it would be and ballistics tests later showed the gun to be the one that fired the shots injuring Logan.

Lara was charged with attempted first degree murder, two counts of use of a deadly weapon to commit a felony, and assault in the first degree. Lara filed a motion to suppress the gun found at the residence. The district court denied this motion, finding that the defendant had no reasonable expectation of privacy in the area from which the gun was seized because it was seized from a room in which he had not been staying. Lara appealed to the Nebraska Supreme Court.

Supreme Court Analysis

The *Lara* court held that Lara's status as an overnight guest was, by itself, enough to show that he had a legitimate expectation of privacy in the "home" or "premises." The fact that the gun was found in a room other than the one in which Lara was sleeping was irrelevant. According to the *Lara* court, "Cases discussing an overnight guest's legitimate expectation of privacy do not limit this expectation of privacy to only the room in which the guest actually stayed. . . . While an overnight guest's legitimate expectation of privacy does not extend to areas of the host's home which are off limits to the guest or of which the guest has no knowledge, there is no evidence that Lara was confined

to a restricted area of the residence or that any area of the home was off limits.”

However, the inquiry did not end there. The *Lara* court concluded that, even without the gun or any related ballistics testing, there was overwhelming evidence to convict Lara. He admitted to being present at the party, he matched the description of the shooter, and the victim identified Lara in a photographic lineup. Therefore the properly admitted evidence supported Lara’s conviction even after suppression of the gun.

Extreme Nervousness and Reasonable Suspicion: Any Connection?

State v. Anderson, 258 Neb. 627, 605 N.W.2d 124 (2000)

Factual Background

In *State v. Anderson*, Cristopher Kolb, a Nebraska State Trooper stopped the defendant Anderson’s vehicle on I-80 for failing to display a front license plate. The rear plate was from Ohio. Upon asking for Anderson’s license and registration, Kolb observed Anderson’s carotid artery pulse beating intensely. Anderson then had difficulty locating his registration. His hands were also visibly shaking. When Kolb asked where Anderson was coming from, Anderson hesitated for several seconds and then said that he had stayed all night in North Platte, Nebraska. Kolb then specified that he was asking where Anderson had initiated his trip, to which Anderson responded, Albuquerque, New Mexico.

After a driver’s license and criminal history check turned up nothing on Anderson, Kolb returned Anderson’s license and registration and issued him a violation card, which carries no penalty. Both prior to and after issuance of the violation card, Anderson’s carotid artery continued to pulse, his

hands continued to shake, and he continued to act nervously.

Kolb then asked if Anderson was carrying any illegal drugs or guns. Anderson re-



sponded in the negative, but stared straight ahead, whereas

Pursuant to a traffic stop, extreme nervousness of the driver does not constitute reasonable suspicion to detain the person for a canine sniff of the vehicle.

he had been making eye contact with Kolb before the mention of narcotics.

Kolb then asked for consent to search Anderson and his vehicle, but Anderson refused consent. Kolb then informed Anderson that he was going to call a canine unit to sniff the vehicle. He further told Anderson to wait in the vehicle while he summoned the canine unit.

The canine unit arrived within a few minutes. After the canine began to sniff the vehicle’s exterior, it alerted to the trunk. The trunk was then opened, exposing four bundles of marijuana. As a result, Anderson was convicted of possession of a controlled substance with intent to distribute and sentenced to a term of imprisonment not less than 18 months nor more than three years.

At trial, Anderson made a motion to suppress the evidence found in his trunk. The trial court overruled this motion, finding that Kolb had a reasonable and articulable suspicion that Anderson was engaged in criminal behavior. It is this ruling that the Nebraska Supreme Court addressed in *Anderson*.

Supreme Court Analysis

The *Anderson* court first noted that the initial traffic stop was justified: “It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.” However, the court held that “[t]he reasonable scope of the initial traffic stop ended when Anderson refused to consent to a search of his vehicle.”

The court further held that the continued detention of Anderson was a seizure within the Fourth Amendment. According to Kolb's testimony at trial, Anderson was not free to leave. Thus, "[U]nless Kolb had a reasonable, articulable suspicion for believing that criminal activity was afoot, continued detention of Anderson became unreasonable after Kolb had finished processing Anderson's traffic violation."

Ultimately, the *Anderson* court held that Kolb did *not* have reasonable suspicion to continue the detention:

"Trembling hands, a pulsing carotid artery, difficulty locating a vehicle registration among documents in a glove box, and hesitancy to make eye contact are signs of nervousness which may be displayed by innocent travelers who are stopped and confronted by an officer. Standing alone, these observations did not afford Kolb a basis for believing that Anderson was involved in criminal activity. Likewise, Anderson's hesitation before responding to Kolb's inquiry as to where he was coming from cannot be viewed as indicative of criminal behavior, in that the question is not specific as to whether Kolb was inquiring about the starting point of the trip or about the place from which Anderson had departed that day. Anderson's actions during the stop, as described by Kolb, did not afford a basis for a reasonable suspicion of criminal activity, but, rather, supported nothing more than a 'hunch.'"

Thus, the court held that the evidence found in Anderson's trunk pursuant to the canine sniff was improperly admitted at trial.

Searches of an Automobile Accident Scene and Terry Searches of a Person: What are the Limits?

State v. Scovill, 9 Neb. Ct. App. 118, 608 N.W.2d 623 (2000)

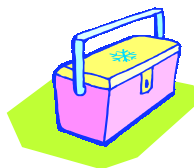
Factual Background

Nebraska State Patrol Trooper Kyle Johansen was dispatched to the scene of a one-car accident that occurred earlier in the day in rural Thayer County, Nebraska. The accident scene had not yet been cleaned up, and Trooper Johansen was dispatched after a passerby reported seeing a weapon in the vehicle.

At the time Johansen responded to the call, no one else was present at the accident scene. When Johansen looked inside the vehicle, he immediately observed a handgun on the front passenger seat. Johansen opened the passenger door and examined the gun, thereby observing that the weapon was a BB gun.

After making this determination, Johansen was curious as to who owned the car, so he opened the glove box and found the car's registration, which listed Scovill as the owner. He also found what he believed to be drug paraphernalia. Johansen then searched the remainder of the car as well as the items strewn about the accident scene.

Pursuant to his search of the accident scene, Johansen discovered and searched certain closed containers. First was a whis-



If these closed containers were thrown from a vehicle during an accident, you still need probable cause to look inside.



key bag in which Johansen could feel a small box. He opened the bag and removed

the box, then opened the box and found drug paraphernalia therein. Johansen also came across a closed six-pack cooler, which he opened. Inside he found more drug paraphernalia. Lastly, in plain view, Johansen observed a bong lying a considerable distance from the vehicle. He then collected the paraphernalia and other items strewn about the scene, placing the paraphernalia in his patrol car and the rest of the items in the trunk of Scovill's car.

Johansen then learned from a local Deputy Sheriff that Scovill could probably be found at a nearby truck stop. Johansen went to the truck stop, found Scovill leaning against an outside wall of the building, and initiated an encounter. Scovill acknowledged that he was the only occupant in the car at the time of the accident and that the items in the car belonged to him. Johansen then explained that he had found drug paraphernalia at the scene and then asked whether Scovill had any weapons or contraband on his person. Scovill stated that he did not have any weapons.

Johansen then proceeded to perform a pat down search of Scovill. This search revealed drug paraphernalia and three controlled substances. At trial, "Johansen testified that he conducted the pat-down search because, based on what Johansen had found at the scene, he believed Scovill 'still could have had drugs on him or possibly a weapon.'" On cross-examination, Johansen further admitted that there was no reason to believe that Scovill was armed and dangerous.

Prior to the pat down, Johansen could not have arrested Scovill because he knew that possession of drug paraphernalia was an infraction that justified only the delivery of a citation. Subsequent to the pat down, Johansen arrested Scovill for possession of methamphetamine, marijuana, and drug paraphernalia.

At trial, the court denied Scovill's motion to suppress and convicted him on three separate counts arising from evidence seized pursuant to the pat down search. The Nebraska Court of Appeals reversed.

Court of Appeals Analysis

The Court of Appeals analyzed separately Johansen's search of the glove box, his search of the accident scene, and his pat down search of Scovill. According to the court, for evidence to be admissible when seized pursuant to a warrantless search, "the State must show that the search falls within one of the listed exceptions to the warrant requirement."

A. Glove Box

Scovill argued that Johansen's search of the glove box was illegal, and that all subsequent evidence was fruit from the poisonous tree. The State argued that the search was within (1) the inventory exception, or, in the alternative, (2) a community caretaking exception. The *Scovill* court disagreed.

As to the inventory exception, the court noted that inventory searches are excepted from the probable cause requirement only if they are governed by "some standardized procedure or established routine." The State produced no evidence regarding procedures or routines that may have existed. Furthermore, according to the court, "[T]he record does not reflect that Johansen searched the car and collected the items strewn about in order to secure and protect them" Thus, the *Scovill* court held that the inventory exception did not apply.

In regard the community caretaking exception alleged by the State, the court acknowledged that such an exception to the probable cause requirement may exist, but



Curiosity as to who owns this car is not enough to justify looking in the glove box.

held that it was not met in the present case. According to the court, “[N]o evidence suggests the presence of any exigent circumstances . . . The record presents no evidence that Johansen’s duties while at the scene of the accident required him to open and search the glove box.” Thus, the search of Scovill’s glove box was illegal.

B. Accident Scene

The State argued that the evidence seized pursuant to Johansen’s search of the accident scene was admissible regardless of the glove box search because Scovill had no reasonable expectation of privacy in such strewn-about items. The *Scovill* court disagreed.

According to the court, “[W]e conclude that a driver of a vehicle does not lose his or her expectation of privacy in containers which had been in a vehicle but which were strewn about near the vehicle as a result of an accident.” Thus, such evidence is not admissible when seized without a warrant absent some exception to the warrant requirement.

As to the closed containers searched by Johansen, the State argued that such was justified under the automobile exception, which allows police to search every part of a vehicle and any closed containers therein if probable cause exists to search the vehicle generally. The court disagreed. It held, “After assessing that the weapon was a BB gun, Johansen did not have probable cause to search Scovill’s car or the containers . . .” Thus, the court found inadmissible all evidence from the scene of the accident, except for the bong.

As to the bong found by Johansen, the court held that it was admissible under the “plain view” exception to the warrant requirement, since the bong was laying by itself on the ground. The court then held that “[t]he bong alone may have justified Johansen in continuing an investigation and perhaps given him reasonable suspicion to con-

duct a Terry stop of Scovill at the truckstop, but alone, it does not justify a full search.” Thus, although Johansen was allowed to encounter Scovill, his search of Scovill’s vehicle and the closed containers at the accident scene was illegal.

C. Pat Down

The *Scovill* court did not reach the question of whether Johansen had a reasonable suspicion to conduct the pat down of Scovill. Instead, it found the search of Scovill’s person to be unlawful on the grounds that it exceeded the limited scope of a *Terry* search. The court stated that, absent the exception for searches incident to an arrest, “a pat-down search must be ‘carefully limited’ to a search for weapons.” Thus, “a search conducted to look for both



firearms and controlled substances exceeds the scope of a *Terry* search.”

According to the court, “Johansen testified that he patted Scovill down because he believed Scovill could still have drugs on him or possibly a weapon, and [Johansen] admitted that he thought he did not have grounds to arrest Scovill prior to the search of his person . . .” Thus, because “a search for this combination of reasons goes beyond the permissible scope of a *Terry* search,” the *Scovill* court held that all of the evidence seized pursuant to the pat down was inadmissible.

Conclusion

The only evidence admissible against Scovill was the bong. The searches of the glove box, the two containers at the accident scene, and Scovill’s person were unconstitutional. Therefore, the court of appeals reversed Scovill’s convictions.

Don’t pat this guy down unless it is for the sole purpose of finding a weapon.

OTHER ITEMS OF INTEREST IN NEBRASKA

LANCASTER COUNTY DISTRICT COURT DNA EVIDENCE SUPPRESSED

In *State v. Graves*, a first-degree murder case, Lancaster County District Court Judge Paul Merritt recently ruled that DNA evidence seized pursuant to a search should be suppressed because the search warrant lacked probable cause. The evidence at issue was DNA from a blood-soiled shirt found pursuant to one of three searches of the defendant's apartment.

The judge ruled that the warrants for all three searches were issued without probable cause because police and prosecutors did not provide adequate evidence that the defendant actually lived at the apartment. Additionally, the judge said the affidavit seeking the first search warrant contained a deliberately false statement: that criminals always take their weapons with them when they move.

The Lancaster County Attorney's Office says that neither prosecutors nor police meant to mislead anyone, and has appealed the judge's decision on this matter. Stay tuned for further details.

THERE MAY BE A LOWER BLOOD AL- COHOL LIMIT ON THE HORIZON

Hmmm, I
might have
to pass on
this one.

Congress has passed a measure that encourages states to adopt a 0.08 blood alcohol content standard as their legal threshold for drunken driving. Under the federal provision, states that don't adopt such a standard by the year 2004 will stand to lose millions of dollars in federal highway funds.

Eighteen states and the District of Columbia currently have 0.08 laws, and in Massachusetts, evidence of a level of 0.08 is considered evidence but not proof of drunkenness. However, in 31 states, including Nebraska, a 0.10 blood alcohol content is the legal threshold for drunken driving.

* * *

--The source of this information was an AP article, "Congress OKs 0.08 Blood Alcohol Limit," by Jim Abrams, that was printed on page 1A of the Lincoln Journal Star, October 4, 2000.



RECOGNITION

Kerry Crosby, Mark Unvert, and Jerome Blowers (from left to right) are Investigators for the Family Crimes Unit. On November 5, 2000, the Child Advocacy Center presented its Certificate of Recognition to these three Investigators for their excellent service. The Lancaster County Attorney's Office would also like to recognize these individuals and all law enforcement officers for their invaluable work.

UNITED STATES SUPREME COURT

CONFESSIONS

WHERE DID THE MIRANDA WARNINGS COME FROM—A BRIEF HISTORY

“You have the right to remain silent; anything you say can and will be used against you in a court of law. You have the right to an attorney; if you cannot afford an attorney, one will be appointed to you.” This is quite possibly the most well-recognized and repeated set of instructions in law enforcement, but where did it come from and why is it required? What follows is a brief history of the well recited and often challenged *Miranda* warning.

Prior to the United States Supreme Court ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966), the admissibility of confessions was evaluated under a voluntariness test. Courts made their decisions as to the admissibility of confessions on a case-by-case basis, relying mainly on three factors: reliability of the confession, questionable police practices, and whether or not the confessions were a product of the defendant’s free will. In determining whether or not the three factors listed above led to an impaired confession, the courts looked at several considerations, including: the number of interrogators; the length of the questioning; the place of the questioning; whether the right to counsel was denied; and the characteristics of the subject being interrogated, such as age, physical and mental condition, education, and experience. This “totality of the

circumstances” test was criticized, in part, because it left a great deal of discretion to the trial judge, which led to a wide range of decisions that failed to give any clear guidance to police. Thus, the need for a bright-line rule helped pave the way for the decision in *Miranda*.

The *Miranda* Court changed the focus of the inquiry into the admissibility of a suspect’s incriminating statements. The Court found that coercion was inherent in all custodial interrogations, and that such coercion blurred the line between voluntary and involuntary statements. Thus, the Court laid down concrete constitutional guidelines for law enforcement agencies and the courts to follow. These guidelines have replaced the totality of the circumstances approach with the rule that the admissibility of any statement given during custodial interrogation depends on whether the police provided the suspect with the *Miranda* warnings.

However, it is important to note that the *Miranda* warnings are not required unless three conditions are met. First, the defendant

You have the right remain silent; if you give up that right, everything you say can and will be used against you in court. You have the right to an attorney; if you cannot afford one, one will be appointed.

must be in custody. Second, the suspect’s confession must come as a direct result of interrogation. Lastly, *Miranda* applies only if the interrogation and custody are at the hands of the police or some other law enforcement agency.

Miranda Lives to See Another Day

Dickerson v. U.S., 120 S.Ct. 2326 (2000)

Factual Background

Charles Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence. All convictions were violations of Title 18 of the United States Code. Prior to his trial, Dickerson moved to suppress a statement he had made at an FBI field office, based on the fact that he had not received his *Miranda* warnings before being interrogated. The district court granted the motion to suppress and subsequently, by a divided vote, the United States Court of Appeals for the Fourth Circuit reversed the suppression order. Even though the Court of Appeals agreed with the district court's conclusion that Dickerson had not received his *Miranda* warnings, it held that the statements were admissible under 18 U.S.C. § 3501, which was a Congressional attempt to replace *Miranda* with a test that makes statements admissible if they were voluntary. The Fourth Circuit concluded that the holding in *Miranda* was not a constitutional one, and, therefore, that Congress could, by statute, have the final say on the question of admissibility.

Supreme Court Analysis

The Supreme Court, by a decisive 7-2 vote, overruled the Fourth Circuit's decision and held that "Miranda announced a constitutional rule that Congress may not supersede legislatively. Interestingly, the *Dickerson* Court did *not* hold that the *Miranda* warnings *themselves* are constitutionally required. However, it noted that any legislative solutions differing from the prescribed *Miranda* warnings must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous

opportunity to exercise that right." According to the *Dickerson* Court, § 3501 did not meet those standards. Likewise, the Court found that, although "there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided . . . we do not agree that these additional measures supplement § 3501's protections sufficiently to meet the constitutional minimum."

Finally, in further support of its opinion, the *Dickerson* Court reasoned that since the *Miranda* warnings are now so imbedded in police practices and procedures, there would be little value in changing them today. Therefore, the *Miranda* warnings remain a prerequisite for admissibility of a confession.

SEARCH AND SEIZURE

Is an Anonymous Tip Good Enough to Stop and Frisk?

Florida v. J.L., 120 S.Ct. 1375 (2000)

Factual Background

In Miami, Florida, an anonymous caller reported to police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Relying on this tip, an officer went to the bus stop and saw three black males. One of these persons, J.L., was wearing a plaid shirt. Other than this anonymous tip, the officers had no reason to suspect any of the three of illegal conduct. The officers saw no firearms nor did they observe any unusual movements.

One of the officers frisked J.L. and seized a gun from his pocket. The trial court granted his motion to suppress the gun on

grounds that it was obtained as the result of an illegal search. After that decision was overruled by an intermediate appellate court, the Supreme Court of Florida agreed with the trial court and held that the search was invalid.

Terry Stop and Frisk Rule

According to the rule set forth by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), when a police officer observes unusual conduct that leads him reasonably to conclude that criminal activity is afoot, she may briefly detain the suspect in order to make inquiries. This brief detention can occur based only on the reasonable suspicion of the officer relying on her experience; the higher standard of probable cause is not required. Once the stop described above has occurred, if the officer still believes the unusual conduct she observed is criminal in nature, and that the suspect may be armed and potentially dangerous, she may conduct a carefully limited search of the suspect's outer clothing for the protection of herself and others. The search must be limited to a search for weapons.

Supreme Court Decision in J.L.

The *J.L.* Court unanimously held that the anonymous tip did *not* exhibit sufficient indicia of reliability to satisfy the standard of reasonable suspicion for the stop and frisk. According to the Court:

"The anonymous call . . . provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. . . . All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L."

The Court further noted that, although the tip accurately described the suspect's location and physical attributes, "Such a tip . . . does not show that the tipster has knowledge

of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Thus, since nothing other than the anonymous tip supported the officer's suspicion that J.L. was carrying a gun, the Court held that the stop and frisk was illegal.

If you are going to stop and frisk one of these people, an anonymous tip as to the suspect's location and physical attributes does not justify reasonable suspicion.

Interestingly, the *J.L.* Court suggested that the need for reliability "might" be relaxed in cases (1) where great danger was alleged, such as when the report is that someone is carrying a bomb; or (2) where the place indicated by the tip involves a public place, such as a school or public airport, where the reasonable expectation of privacy is somewhat relaxed. However, this language is mere dicta and is irrelevant to the particular holding in *J.L.*

Bag Squeezin' on a Bus: An Invalid Search and an Invasion of Privacy

Bond v. U.S., 120 S.Ct. 1462 (2000)

Factual Background

The defendant in *Bond* was a passenger on a Greyhound bus traveling from California to Arkansas. As required by law the bus stopped at the permanent Border Patrol checkpoint in Sierra Blanca, Texas. It was there that a border patrol agent boarded the bus to check the immigration status of its passengers. After that inspection was satisfied, the officer began walking back towards

the front of the bus while at the same time squeezing the soft luggage that passengers had stored in the overhead storage space above their seats. The defendant was seated towards the back of the bus. As the agent inspected the luggage above where the defendant was seated, the agent squeezed a green canvas bag and noticed it contained a "brick-like" object. The defendant admitted the bag was his and allowed the agent to open it. The agent discovered a brick of methamphetamine that had been wrapped in

Should an officer on a bus be allowed to squeeze the passengers' luggage while at the same time looking for illegal immigrants. Or does the passenger have a reasonable expectation of privacy in the area above his seat where he has placed his bags

duct tape and rolled up in a pair of pants.

The defendant was charged with conspiracy to possess and possession with intent to distribute drugs. He moved to suppress the drugs, arguing that they had been illegally seized. The district court denied the motion and found the defendant guilty. The Fifth Circuit Court of Appeals agreed with the district court's ruling that the agent's manipulation of the bag was not a search. The defendant appealed to the United States Supreme Court, which reversed by a vote of 7-2, holding that the manipulation of the bag violated the Fourth Amendment's guarantee against unreasonable searches.

Supreme Court Analysis

The *Bond* Court first cited the relevant text of the Fourth Amendment, which says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated" The Court then clarified that it employs a two-step analysis in determining whether a search was in violation of the Fourth Amendment: "First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy [i.e., subjective test] . . . Second, we inquire whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable' [i.e., objective test]."

Before reaching this analysis though, the *Bond* Court made clear that the defendant's luggage was a personal effect that is protected by the Fourth Amendment. Had the Court found otherwise, the two-step analysis would have been unnecessary.

Then, as to the first step of the Fourth Amendment analysis, the Court held that the defendant clearly had a subjective expectation of privacy, because he "sought to preserve privacy by using an opaque bag and placing that bag directly above his seat." As to the objective step, the Court held that, although the defendant's expectation of privacy could not reasonably be considered absolute, it *was* reasonable for the defendant to expect that no one would manipulate his luggage so as to determine its contents:

"When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment."

As a result, the defendant's conviction was overturned.

Don't let this happen to your defendant prematurely.

FEDERAL COURTS

8TH CIRCUIT SEARCH AND SEIZURE

So, When *Can* You Call in the Canines?

U.S. v. Foley, 206 F.3d 802 (8th Cir. 2000)

Factual Background

In *United States v. Foley*, Nebraska State Patrol Trooper Frank Peck stopped a vehicle for speeding. The vehicle was driven by Stephanie Wilson. Lee Foley, the defendant, was the sole passenger. Upon Peck's request, Wilson produced her driver's license, and Foley produced the rental agreement for the vehicle. Peck had observed that the vehicle had an air freshener in the window, which he found odd given that the vehicle was rented. Peck then asked Wilson to accompany him to the patrol unit while he completed a computer check on her license.

While checking her license, Peck engaged Wilson in general conversation regarding her departure location and ultimate destination. Wilson stated that she and Foley had been visiting Foley's son in California and were returning to their home in Indianapolis. She also stated that Foley had rented the vehicle. However, from the rental agreement, Peck observed that the vehicle was rented in the name of Ruby Davis, and Foley was listed as an additional driver.

Trooper Peck then returned to the rented vehicle and requested Foley's identification.

He also asked Foley if he was returning from a funeral. Foley initially responded in the affirmative, but later recanted, stating that he and Wilson had been visiting his grandson in California. In response to additional questioning, Foley stated that he and Wilson had flown to California and that his daughter-in-law had rented the vehicle. But Foley was unable to produce the name of this daughter-in-law. Trooper Peck further observed that Foley seemed nervous and avoided eye contact.

Peck then returned to his patrol unit to complete a computer check on Foley's license. While doing so, he asked Wilson how she and Foley had traveled to California, and she responded that they had driven. Peck then inquired as to the make of the vehicle they had driven to California and

Pursuant to a traffic stop, nervousness of a passenger, the passenger's inability to remember the name of an alleged daughter-in-law, gross divergence between the passenger's and driver's explanations of their purpose and travel plans, and the presence of a masking odor constitutes reasonable suspicion to detain the driver and passenger for a canine sniff of the vehicle.

observed that, after a significant pause, Wilson looked at the "Bronco" insignia on the dashboard of his patrol unit and stated that she and Foley had driven a Bronco to California.

Based on the above, Trooper Peck returned to the rental car and informed Foley that he intended to perform a canine sniff of the vehicle's exterior. In response to Peck's inquiry regarding the presence of guns or drugs in the vehicle, Foley initially responded in the negative, but later stated that there might be some marijuana in the back seat.

Pursuant to a sniff of the vehicle's exterior, the canine alerted to the trunk. When the trunk was opened, cocaine was found in a heavy black bag, and Foley was then placed under arrest. The entire stop lasted approximately thirty minutes.

At trial, Foley's motion to suppress evidence was denied. He subsequently entered a conditional plea of guilty subject to appeal of the suppression ruling.

8th Circuit Analysis

On appeal, Foley first challenged the propriety of Trooper Peck's question about his preceding attendance at a funeral. Foley claimed that the question was not reasonably related to the circumstances that justified the stop, thereby rendering the subsequent detention and search illegal. However, the *Foley* court held that the question was a "simple, non-incriminating query regarding the purpose of the trip," and as such, it was reasonably related to the permissible goal of seeking and verifying information regarding Wilson and Foley's destination and purpose.

More importantly, the *Foley* court went on to hold that reasonable suspicion for the expanded scope of Trooper Peck's investigation existed wholly independent of the funeral question. In so holding, the court noted that in evaluating reasonable suspicion, "[W]e look to the totality of the circumstances, in light of the officer's experience." Under this standard, the court held that the articulable facts sustaining a finding of reasonable suspicion were: (1) the presence of a masking odor, (2) Foley's nervous behavior, (3) Foley's inability to recall the name of his purported daughter-in-law, and (4) the vast divergence between his and Wilson's allegations regarding travel accommodations to California.

Finally, the *Foley* court rejected Foley's challenge as to the duration of the detention. According to the court

"We do not find the length of the detention . . . to be unreasonable. Trooper

Peck acted diligently to obtain and verify information. This information created additional suspicion justifying the brief delay pending arrival of a backup unit and performance of the subsequent dog sniff. The entire stop lasted under thirty minutes."

Thus, the *Foley* court upheld the trial court's denial of Foley's motion to suppress.

Reasonable Suspicion and Airport Searches: Are You Familiar with the Eighth Circuit's Standards?

U.S. v. Eustaquio, 198 F.3d 1068 (8th Cir. 1999)

Factual Background

On September 19, 1997, Veronica Eustaquio arrived at Eppley Airfield in Omaha, Nebraska. Investigator Lutter and Sergeant Burns, members of the Commercial Interdiction Unit of the Nebraska State Patrol, observed Eustaquio leave the plane and walk through the airport directly to a taxi stand. The officers noted that Eustaquio did not stop for any luggage and believed that she was acting "as if she was forcing herself to appear relaxed." The officers then approached Eustaquio at the taxi stand, identified themselves as law enforcement officers, and asked if they could talk with her. Eustaquio agreed.

Eustaquio gave Lutter her California driver's license and plane ticket when asked to do so. The ticket was a one-way fare from Ontario, California, which had been purchased that same day with cash. Lutter then informed Eustaquio that he was a narcotics investigator and asked whether she had any contra-

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